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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CYNTHIA SMITH

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF KANSAS, INC.,

Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit.

PETITION FOR WRIT OF CERTIORARI

Beth Regier Foerster
James E. Benfer, III
McCULLOUGH, WAREHEIM & LABUNKER, P.A.
1507 S.W. Topeka Boulevard
Topeka, Kansas 66612
(913) 233-2323

61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should a conflict be resolved between rulings of the Tenth Circuit and the Seventh Circuit as to whether the Americans with Disabilities Act (ADA) requires an employer to provide reassignment to an open and available position as a reasonable accommodation when a disabled individual cannot perform the essential functions of the position they hold?

2. Whether the Tenth Circuit Court's ruling should be upheld in failing to follow the administrative agency, EEOC interpretive guidelines and express legislative intent in requiring employers to provide reassignment to an open and available position as a reasonable accommodation when a disabled individual cannot perform the essential functions of the position they hold?

3. Whether a breach of agreed accommodations results in defendant's liability for damages under the ADA?

4. Whether the Constitutional requirements of the Seventh Amendment were followed, which strictly limit the judicial granting of summary judgment motions?

LIST OF ALL PARTIES

Plaintiff/Appellant, Cynthia Smith. Defendant/Appellee,

Blue Cross Blue Shield of Kansas, Inc.

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BASIS FOR JURISDICTION

DATE OF JUDGMENT

December 17, 1996

DATE OF ORDER ON REHEARING

February 7, 1997

STATUTORY PROVISIONS FOR JURISDICTION

42 U.S.C. § 12101 et seq; 28 U.S.C. § § 1331, 1343

NOTIFICATION

Not applicable.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

42 U.S.C. § 12101 et seq, 42 U.S.C. sec. 12111(9)(B), Seventh Amendment to the Constitution, 29 C.F.R. App. § 1630.2(o)

STATEMENT OF THE CASE

Petitioner's cause of action is under the Americans with Disabilities Act (ADA) for discrimination in the terms and conditions of her employment and in her termination. Cynthia Smith had worked over three (3) years for Blue Cross Blue Shield of Kansas, Inc. as a Correspondent answering telephones and responding to inquiries

regarding the denials and coordination of benefits for the insurance company. She requested a demotion to a less stressful job as a Prescreener which did not have, as a job requirement, the necessity of telephone contact. Petitioner's treating physicians for her diagnosed medical condition of panic and anxiety disorder provided written medical requests to Blue Cross Blue Shield of Kansas, Inc. that plaintiff be given the less stressful job of Prescreener. In response to plaintiff's request for accommodation for the anxiety and panic disorder which was documented by her health care providers, Blue Cross Blue Shield of Kansas, Inc. agreed to demote Cynthia Smith to the Prescreener position as an accommodation.

After agreeing to demote the plaintiff to the Prescreener position so she would not have to handle telephone calls with people who had been denied insurance benefits, plaintiff claims her supervisor with full knowledge of her demotion and medical condition, brought her Correspondent work on November 17, 1992. Correspondent work required direct telephone contact with insureds and was outside her job accommodation as a Prescreener. Plaintiff claimed she had an immediate and severe anxiety reaction to the

prospect of having to deal directly with irate insureds and this resulted in a severe panic reaction and emotional distress which resulted in plaintiff's in-patient hospitalization followed by extended out-patient treatment. Plaintiff contended that requiring plaintiff to perform Correspondent work was a breach of the employer's agreement to accommodate plaintiff's disability which is a failure to reasonably accommodate her known disability under the ADA.

Petitioner claimed respondent with full knowledge of her medical condition and the fact that she was undergoing in-patient and out-patient hospitalization and treatment, removed her from her accommodated position of a Prescreener without consulting with her. Petitioner claims this was an additional failure to accommodate her known disability that of time off work for medical treatment in order to recover to be able to return to the Prescreener position.

At no time in pleadings or court documents did respondent ever claim that petitioner's identified reasonable accommodations of the demotion to a Prescreener and the reasonable accommodation of time off work to recover from medical treatment would cause respondent any undue hardship.

In Memorandum and Orders entered on July 16, 1995 and August 29, 1995 District Court Judge Dale Saffels granted respondent Summary Judgment. The Tenth Circuit panel, in a decision dated December 17, 1996, and denial of Rehearing on February 7, 1997, found that an accommodation that eliminates the essential function of the job is unreasonable and that this is inconsistent with the reasonable accommodation of reassignment.

In this appeal, petitioner submits that this case presents critical legal issues and genuine issues of material fact. Specifically, petitioner presented evidence by her trainer, that petitioner was successfully performing her job duties as a Prescreener until she was told that she was brought Correspondent work.

ARGUMENT

I. The Tenth Circuit Court of Appeals and the Seventh Circuit Court of Appeals are in conflict with the requirement to provide a reasonable accommodation of reassignment into an open and available position under the ADA.

The issue, as a matter of law, of whether an individual with a

disability is entitled to a reasonable accommodation of reassignment is of critical importance to individuals with disabilities. If employers are not required under the ADA to consider reassignment to other open and available positions for which the individual is qualified, the entire intent of the ADA will be defeated. The intent of the ADA as expressed in its congressional enactment is to protect people from myths, stereotypes and fears about disability, and to get people off of the disability rolls. Legislative history included frequent examples of people who have been discriminated against, including those with a history of mental or emotional illness, heart disease and cancer. Therefore, to fail to consider reassignment to another position by definition puts people at risk to be placed on disability rolls.

The Tenth Circuit Court of Appeals' decision in the *Smith* case stands for the interpretation of the ADA that an accommodation that eliminates the essential function of the job is unreasonable and this is inconsistent with the reasonable accommodation of reassignment. This decision is inconsistent with the Court's prior interpretation of the Rehabilitation Act. In discussing the requirement of accommodation under Section 504, the United States Court has

already suggested, *in dicta*, that the Rehabilitation Act does not invariably create a right in a handicapped employee to be reassigned to a "light duty" job as a reasonable accommodation. It may, however, in certain limited circumstances oblige an employer to accommodate a handicap employee who is no longer qualified to perform his original job by placing him in a different position.

> Employers have affirmative obligation to make a reasonable accommodation for handicap employee. Although they are not required to find another job for an employee who is not qualified for the job he or she is doing, they can not deny an employee alternative employment opportunities reasonably available under the employers existing policies. *Arline*, 480 U.S. 273, 289 [1 AD cases 1026] (1987).

Sensitive to this admonition, some courts have decided that, where other positions are reasonably available the phrase "position in question" necessarily includes other positions within the agency to which an employee could be reassigned. *Taylor v. Garrett*, 2 AD cases 778, (E.D. Pa. 1993). (citations omitted).

In 1992, Congress amended the Rehabilitation Act to provide that the standards for determining what constitutes employment discrimination 'shall be the standards applied under Title I of the Americans with Disabilities Act.' Act of October 29, 1992, Pub. L. No.

102-569, Title V. sec. 506, 106 Stat. 4360, 4428. Thus, the Rehabilitation Act incorporates the ADA's definition of reasonable accommodation, which recognizes re-assignment to a vacant position as a potential accommodation required under the ADA:

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquiring or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individual with disabilities. 42 U.S.C. sec. 12111(9)(B).

In passing the ADA, Congress specifically intended that the case law established under the Rehabilitation Act be used in deciding cases fought under the ADA. *See* 42 U.S.C. § ¶ 12117(b); *EEOC v.* AIC Secc. Investigations, Ltd. 820 F. 106 (N.D. Ill. 1993).

The Tenth Circuit decision in *Smith* is in conflict with Seventh Circuit Court of Appeals case of *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996). 8 NDLR ¶ 322 (Sept. 4 1996). The Seventh Circuit states:

> "Our review of the ADA, its regulations and the EEOC's interpretive guidance leads us to the conclusion of the majority of courts that have addressed the issue that the ADA may require an employer to reassign a disabled employee to a different position as a reasonable

> **accommodation where the employee can no longer perform the essential functions of their current position. . . . The ADA may only require an employer to reassign a disabled employee to a position for which the employee is otherwise qualified. (*White v. Yorke Int'l Corp.* 45 F.3d 57, 362 (Tenth Cir. 1995).**

The Court held in *White, Supra* that the qualified individual with a disability had the burden of proof to identify a reasonable accommodation which included an open and available position that the person is qualified for when the person could not perform the essential functions of the position they were performing. (*White, supra*). The panel in the instant cause held that an accommodation that eliminates the essential function of the job is unreasonable, and this is inconsistent with the reasonable accommodation of reassignment.

The *White* decision was based on the express language of the Americans with Disabilities Act (ADA) 42 U.S.C. § 12101-12213, 12111 (9), which protects "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

Therefore, the panel's decision in *Smith* is inconsistent with

established interpretation of the Rehabilitation Act, and the Tenth Circuit's decision conflicts with the Seventh Circuit on this issue. This legal issue is of paramount importance for qualified disabled individuals, as exclusion from job opportunities is the exact myth and stereotype Congress intended to remedy.

II. The Tenth Circuit Court's ruling is inconsistent with EEOC interpretive guidelines and express legislative intent.

The Supreme Court has previously held that the interpretive guidelines of an enforcing agency should provide guidance to the Courts. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 65, 106 S. Ct. 2399, 2404 (1986). The Tenth Circuit Court of Appeals' decision in the instant cause is directly contrary to the EEOC's Interpretive Guidance found at 29 C.F.R. App. § 1630.2(o):

> "In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship . . . Reassignment may not be used to limit, segregate or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay, status, etc, if the

> individual is qualified, and if the position is vacant within a reasonable amount of time throughout "an employer" may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. 29 C.F.R. App., § 1630.2(o).

> The Supreme Court has held that: "As an 'administrative interpretation of the Act by the enforcing agency,' these Guidelines, 'while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment which courts and litigants may properly resort to guidance.'" (*Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404 (1986)).

The legislative history in the enactment of the ADA specifically addressed the issue of whether reasonable accommodation includes reassignment and the answer was in the affirmative.

> "Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of his disability, can no longer perform the essential functions of the job that she or he had held, a transfer to another vacant job which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker. H.R. REP. NO. 485 II), 101st Cong., 2d Sess. 1990).

Therefore, the express statutory provisions and goals of the 101st Congress in the enactment of the ADA clearly indicate an intent

to include reassignment as an accommodation when a person can no longer perform the essential functions of the position without reasonable accommodation. In the instant cause, both the employee and the employer agreed that the employee could no longer perform her job tasks as Correspondent due to her anxiety disorder. She requested and provided medical documentation of the need for a different job, the job of a Prescreener which was completely different than the essential functions she had performed as a Correspondent. Plaintiff was adequately performing the Prescreener job duties until she was brought work which she was told was Correspondent work. Defendant's Equal Opportunity Coordinator testified that if Cynthia Smith was given Correspondent work after the demotion to a Prescreener position that it would have been a violation of the Americans with Disabilities Act. The panel, therefore, erred in finding on page 5 that "Nothing in the ADA's expressed provisions or goals compels liability in this case," pursuant to 42 U.S.C. § 12111 (9); 29 C.F.R. App., § 1630.2(o) and H.R. Rep. No. 485 II, 101st Cong., 2d Sess. 1990, supra.

III. A breach of accommodations results in defendant's

liability for damages.

The panel erred in determining that there is no liability for an employer that breaches accommodations under the ADA including aggravation of a mental condition. Specifically, the ADA provides for damages under the Civil Rights Act of 1991, including emotional distress, humiliation and compensatory and punitive damages. The U.S. Supreme Court has held that when a work environment includes discriminatory intimidation, ridicule and insults, that psychological harm is a relevant but not necessary consideration. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). The employer that is allowed to breach accommodations without liability for psychological harm and damages contravenes express language of the ADA and well established case law that emotional distress damages can be proven with psychological harm, but that is not an essential consideration. In other words, the liability for the employer exists where breach of accommodations occurred. The liability includes emotional distress damages which may include an aggravation of an emotional condition. This is a separate legal issue from the District Court's reliance upon note 6 of *Garcia-Paz v. Swift Textiles, Inc.*, 873

F.Supp. 547, 546 (D. Kan. 1995). As there is no remedy for a psychological injury under Kansas Workers' Compensation law without trauma pursuant to *Followil v. Emerson Electric,* 234 Kan. 791, 674 P.2d 1050 (1984), the decision in the instant cause leaves plaintiff without remedy for breach of agreed accommodations.

It is respectfully submitted that the employer in this case did breached an agreed upon accommodation, and then took away the employees right to recover and to be able to return to that position by removing her from the Prescreener position while she was under treatment and then terminating her purportedly because of no medical evidence since December 18, 1992, which was shown to be untrue. The employer repeatedly failed to reasonably accommodate the known panic and anxiety conditions of plaintiff, which subjects them to damages under the ADA. The definition of discrimination under the ADA is:

> "not making reasonable accommodations with a known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the entity can demonstrate the accommodations oppose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

Liability for damages results when the employer fails to take action:

> " . . . The employer, under the ADA can avoid liability for emotional distress damages by: " . . . damages may not be awarded under this section where the covered entity demonstrates good faith efforts in consultation with a person with a disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such an individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." 42 U.S.C. § 1981(a) (3).

It is uncontroverted in this case, that the employer failed to consult with the plaintiff in terminating her from her position as a Prescreener while under treatment, and terminated her from employment for a reason that was not true, she had provided medical information after December 18, 1992. Both the Rehabilitation Act and the language of the ADA itself show unpaid leave of absence as a reasonable accommodation. *Cain v. Hyatt*, 734 F. Supp. 671 (E.D.P.A. 1990) and C.F.R. 1630.2 (o). In addition, the EEOC has recently issued new policy guidelines that clearly indicate that the fact that an individuals files for disability benefits does not automatically disqualify them from entitlement to reasonable accommodations. Therefore, the actions of defendant show a failure to consult, failure

to provide reasonable accommodations, and no claim of undue hardship was made by the employer.

IV. The constitutional requirement of the Seventh Amendment strictly limits the judicial granting of summary judgment motions.

Plaintiff had requested a jury trial which pursuant to the Seventh Amendment of the United States Constitution imposes great limitations on the use of summary judgment. The Tenth Circuit has held that:

> "The trial judge must deny a summary judgment motion when reasonable jurors might disagree, even if the judge would find for the moving party. (*City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (Tenth Cir. 1992). (Citing *Dreiling v. Peugot Motors of American, Inc.*, 850 F.2d 1373, 1377 (10th Cir. 1988)).

The panel has ruled "that the one supervisor in one instance failed to be sufficiently sensitive to Smith's mental condition". (Decision p. 5). The factual issue of whether Cynthia Smith was reasonable in her conclusion that she was being required to perform Correspondent work due to a heavy backlog and that would last over a period of time was decided against her by the judge when she is entitled to have that evidence presented to a jury for a determination

of what a reasonable juror might believe. In viewing the evidence most favorable to plaintiff, plaintiff was told she would have to do Correspondent work due to the heavy backlog of Correspondent work with no ending date and was clearly beyond the accommodated job position she had been provided based on her medical documentation that she needed a different position. The Correspondent work was a stack of inquiries, four to five inches thick taken off Correspondent desks.

Under these circumstances, Plaintiff's cause should be determined by a jury pursuant to well established rights in the Seventh Amendment to the Constitution.

Respectfully Submitted;

By: _____
BETH REGIER FOERSTER, #11866

By: _____
JAMES E. BENFER, III, #11234
1507 Topeka Boulevard
P.O. Box 1453
Topeka, Kansas 66601-1453
ATTORNEYS FOR CYNTHIA SMITH
PLAINTIFF/APPELLANT

APPENDIX

Memorandum and Order, U.S. District Court for the District of Kansas, filed July 16, 1995

Memorandum and Order, U.S. District Court for the District of Kansas, August 29, 1995

Judgment, U.S. Court of Appeals, Tenth Circuit, December 17, 1996

Order, U.S. District Court, Tenth Circuit, filed February 7, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CYNTHIA SMITH, Plaintiff, v. BLUE CROSS BLUE SHIELD OF KANSAS, INC., Defendant.	)	CIVIL ACTION Case No. 94-4053-DES

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the court on defendant's Motion for Summary Judgment (Doc. 50). Plaintiff has tiled a response (Doc. 63). Defendant filed a reply to plaintiff's response (Doc. 69).

This case arises out of plaintiff's claim that she was discriminated against in the terms and conditions of her employment and in the termination of her employment by defendant's violation of the provisions of the Americans with Disabilities Act.

The jurisdiction of the court is invoked pursuant to the provisions of 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 12101, the American with Disabilities Act of 1990.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began employment with Blue Cross Blue Shield of Kansas, Inc. ("BCBSK") on June 27, 1988, as a Level III Informal Review Correspondent in the Medicare Division of BCBSK's Government Program Departments. Plaintiff was employed in this position until February 18, 1990, when she became a Level III Correspondent in the Medicare Secondary Payor Division in the same department.

On October 1 1990, plaintiff moved to the Coordination of Benefits ("COB") Inquiry unit of BCBSK's subscriber services Department. Following training, plaintiff became a Level III COB Inquiry Correspondent on January 5, 1991. The function of a COB Inquiry Correspondent was to respond to telephone inquires from BCBSK customers through an Automatic Call Distribution System ("ACD"). COB Correspondents were tied into the system through headsets at their desks. COB Correspondents take incoming calls and depending on the nature of the customer inquiry, may need to return calls at a later date. The job description states that COB Inquiry Correspondents are "physically tied to their work stations via telephone equipment."

Plaintiff has alleged that her job causes her stress because she does not like dealing with irate customers who have been denied benefits. Defendant notes that "employees receive verbal abuse from customers. The job is very stressful . . . The job requires that we handle irate customers who are unhappy while maintaining a level of professionalism as expected by the company to project a good public image."

Plaintiff alleges that in December 1991, she requested a demotion to a less stressful job. Plaintiff says the request was denied.

In late January 1992, plaintiff presented her supervisor a letter from her primary care physician, Dr. Michael Laccheo ("Laccheo") The letter stated that plaintiff was 20 weeks pregnant with an estimated delivery date of May 23, 1992. The letter indicated that the pregnancy was very stressful resulting in plaintiff being tearful, suffering headaches and insomnia. Dr. Laccheo stated that plaintiff found her work very stressful and that she was having a very difficult time talking over the phone. Dr. Laccheo inquired if plaintiff could be relieved of some telephone work and replace it with paperwork.

Although there is some dispute as to whether plaintiff

received relief or the quantity of that relief there is evidence that some degree of relief was afforded plaintiff. In addition, by her own testimony, plaintiff acknowledges that even though she was no longer taking phone calls, she voluntarily answered the phones when things got busy.

On March 2, 1992, plaintiff presented another letter from Dr. Laccheo to her supervisor. The letter, except for the date and the information relating to the length of plaintiff's pregnancy, was identical to the one written in January.

Again, plaintiff was provided some relief and again voluntarily answered phones on her own.

In mid-March, plaintiff presented her supervisor with a physician's statement which noted plaintiff was in good health and could continue to work until her expected delivery date of May 23, 1992. The letter also indicated plaintiff would be able to resume her work six weeks post partum. Dr. Laccheo asked that the telephone duty restrictions be continued noting that he preferred plaintiff be on the telephone no more than two hours/day. Plaintiff also submitted a request for maternity leave with and without pay for the six weeks after her delivery.

Plaintiff submitted two more physician statements relating to her request for maternity leave. The later was an immediate request for leave which would last approximately six weeks. Plaintiff began her maternity leave on May 22, 1992.

In late May, plaintiff submitted an application for the position of Level III Correspondent in the Medicare Division of BCBSK stating she would like to work for Medicare again. Plaintiff interviewed for the position, but was not hired.

Plaintiff was released to return to work following her maternity leave on July 14, 1992. Plaintiff was released with no restrictions.

Plaintiff returned to work. In October while driving to an appointment with her social worker, Carol Bauman ("Bauman"), plaintiff suffered a panic attack. Plaintiff had never before experienced such an event. She saw her primary physician the next day and he suggested that she admit herself as an in-patient to the Parkview psychiatric facility.

Plaintiff and her husband spoke with someone at Parkview and were in the process of gathering plaintiff's belongings when plaintiff called Bauman to tell her of the plan. Bauman disagreed with the

decision to enter Parkview and suggested that plaintiff go to Menningers instead. Bauman arranged for plaintiff to see Dr. William Johns at Menningers.

Plaintiff met with Dr. Johns the next day, described the panic attack, and told him she had been on the prescription medication Xanax. Dr. Johns believed it was possible that plaintiff was suffering from withdrawal from the Xanax.

On October 23, 1992, Dr. Johns faxed a letter to plaintiff's supervisor, Luanne Colhouer ("Colhouer"), regarding plaintiff's absence from work the previous day and noting plaintiff "appears to be having a withdrawal reaction as a result of the discontinuation of a prescription medication (Xanax) which she was given by a physician. The symptoms apparently began on October 20 and worsened on October 21 and 22. She is currently on a medication regimen. The purpose of which is to withdraw her from that medication over the next week."

Later in October, a Level II COB Clerk Expediter/Prescreener position became vacant. Plaintiff asked to be demoted to the position because it did not involve telephone contact with BCBSK customers.

Plaintiff claims she was not given the position so she had

Bauman and Laccheo prepare correspondence recommending that she be allowed to take the position. Both parties prepared such letters in early November indicating plaintiff was under stress and recommending that plaintiff be placed in the Prescreener position.

Colhouer, COB Manager Anthony Tetuan, and Subscriber Services Department Director Don McClaflin discussed the position change and agreed to grant plaintiff's request for transfer to the Level II position. Plaintiff understood this was a demotion resulting in a cut in pay. Plaintiff began work in the new position on Monday, November 7, 1992.

On November 15, 1992, plaintiff suffered a panic attack at home. on Monday, November 16, 1992, plaintiff missed part of her work day so she could attend an appointment with her social worker. Bauman wrote a note to Colhouer stating that plaintiff had attended the appointment and that she was still suffering the on-going difficulty with her withdrawal from medication.

On November 17, 1992, plaintiff worked a full day in the Prescreener position, but claims she was distressed when Colhouer brought her Correspondent work to do. Plaintiff claims this brought on a immediate panic attack because she thought she was being asked

to do telephone work. There is, however, no evidence that the work was at all connected to telephone contact.

Plaintiff left work and contacted Bauman. Arrangements were made for plaintiff to enter Menningers the next day. Plaintiff was admitted to Menningers on November 18, 1992.

Plaintiff was diagnosed with panic disorder, signs and symptoms of extreme anxiety and panic attack, difficulty from stopped medication and occupational difficulties. Plaintiff's admitting psychiatrist was Dr. Patricia Hoffman n/k/a Dr. Patricia Al-Adsani. Plaintiff's treating psychiatrist was Dr. Elizabeth Hatcher.

Prior to December 1, 1992, plaintiff submitted a request for medical leave to BCBSK. Plaintiff's leave was approved as of November 18, 1992. Her request estimated the 2nd date as: "Unknown at this time, after 1st of the year."

On December 1, 1992, Colhouer sent plaintiff a certified letter stating that there was not sufficient information to approve plaintiff's leave and asking that the information be forwarded as soon as possible. Plaintiff received the request on December 4, 1992.

BCBSK received a statement from Dr. Hoffman on December 4, 1992, which said "Please excuse Cindy from work from 11/18/92-

12/18/92. The Pt may require more time off. Because of extreme stress."

Plaintiff was discharged from Menningers on December 4, 1992. Her diagnoses upon discharge were Panic Disorder without agoraphobia and generalized anxiety disorder. Plaintiff was to continue as an out-patient and have her medications prescribed and monitored by Managers.

On December 11, 1992, plaintiff requested a waiver of BCBSK's six month no transfer policy because she wanted to return to the Medicare division. McClaflin agreed to waive the policy and allowed plaintiff to seek other positions even though no Medicare division positions were available at the time.

On January 4, 1993, Bauman wrote BCBSK stating that plaintiff was still suffering from depression and anxiety and that Bauman was unable to predict when plaintiff might return to work.

At the time, BCBSK's Employee Handbook stated that if a leave of absence exceeds 45 days, the organization is relieved of any obligation to return an employee to the same position.

On January 11, 1993, plaintiff was informed that her position had been filled due to the length of the leave, 55 days, and the staffing

requirements of the COB Inquiry Unit.

On January 18, 1993, plaintiff was informed by her treating psychiatrist that she would never release plaintiff to work at BCBSK. After January 1993, plaintiff applied for, and was granted, total disability benefits from Social Security. Plaintiff contended she had been totally disabled since November 17, 1992, and her benefits were retroactive to that date. Plaintiff also applied for, and was granted, total disability as of November 17, 1992, through BCBSK's long term disability plan. Finally, plaintiff requested and was granted a waiver of life insurance premiums due to her disability and again stated she became permanently disabled on November 17, 1992.

Near the end of May 1993, plaintiff received a letter from BCBSK notifying her she had been terminated because the documentation on file only released her from work until December 18, 1992.

Medical documentation in the spring of 1993 indicated plaintiff was unable to work, it was uncertain when she could work again and it was unclear what type of work she would be able to do.

As of November 8, 1994, plaintiff was still not released to return

to any kind of work. In the pre-trial order, plaintiff stipulated to the fact that she has been unable to do any work since November 17, 1992.

Pursuant to the American With Disabilities Act ("ADA"), plaintiff initiated this action on April 4, 1994.

II. SUMMARY JUDGMENT STANDARDS

A court shall render summary judgment upon a showing that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). The substantive law identifies which issues are material. *Id.* at 248 A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. *Id.* Only genuine disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Id.*

The movant has the initial burden of showing the absence of a genuine issue of material fact. *Shapolia v. Los Mamas Nat. Laboratory,*

992 F.2d 1023, 1036 (10th Cir. 1993). The movant may discharge its burden "by 'showing' -- that is, pointing out to the district court-that there is an absence of evidence to support the [nonmovant's] case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). The movant need not negate the nonmovant's claim. *Id.* at 323. Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co. v. Zenith Radio, 475* U.S. 574, 586 (1986). The nonmovant must go beyond the pleadings and, by affidavits or the depositions answers to interrogatories, and admissions on file designate specific facts showing there is some genuine issue for trial. Fed. R. Civ. P. 56(c). *See also Celotex, 477* U.S. at 324 (interpreting 56(e)).

Rule 56(c) requires the court to enter summary judgment against a nonmovant who tails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. *Celotex, 477* U.S. at 322. Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. *Id.* at 323.

When examining a motion for summary judgment, the court

must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence See, *e.g.*, *United States v. O'Block*, 788 F.2d. 1433, 1435 (lath Cir. 1986) (stating that "[t]he court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues").

"Unsubstantiated allegations carry no probative weight in summary judgment proceedings." *Phillips v. Calhoun*, 956 F.2d 949, 951 (10th Cir. 1992). "speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." *Hedberg v. Indiana Bell Telephone Co., Inc.*, 47 F.3d 928, 929 (7th Cir. 1995).

More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed" to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1." Celotex, 477 U.S. at 327.

Essentially, the court performs the threshold inquiry of determining whether a trial is necessary. *Anderson*, 477 U.S. at 250.

That is, the court decides whether there are any genuine factual issues that can be resolved only by a trier of fact because they

reasonably may be resolved in favor of either party. *Id.*

IV. DISCUSSION

As a preliminary matter, the court notes that the ADA became effective July 26, 1992. Any events prior to that date in plaintiff's case are irrelevant because the ADA does not apply retroactively. *Larkins* v. *Ciba Vision Corp.*, 858 F. Supp. 1572 (N.D. Ga. 1994); See *O'Bryant V. City of Midland,* 9 F.2d 421, 422 (5th Cir. 1993).

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

To state a prima facie case of disability discrimination on an employment termination claim, the plaintiff must show: (1) that she is a disabled person within the meaning of the ADA; (2) that she is qualified, that is with or without reasonable accommodation, she is able to perform the essential functions of the job; and (3) that the employer terminated her because of her disability. *White v. York Inter. Corp., 45* F.3d 357, 360-61 (10th Cir. 1995).

The court believes that plaintiff is not qualified within the meaning of the ADA and cannot establish a prima facie case for the following reason: she is unable to perform the essential functions of the job with or without accommodation and is, therefore, not qualified.

Our Tenth Circuit Court of Appeals has articulated a two-part test for determining whether a person is qualified under the ADA:

> First we must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995) quoting *White, supra, 45* F.3d at 360.

The term "essential functions" is defined by the EEOC regulations as "the fundamental job duties of the employment position the individual with a disability holds" and "does not include the marginal functions of the position.[11] 29 C.F.R. §1630.2(n)(1). A job function may be considered essential because the reason the position exists is to perform that particular function. 29 C.F.R. § 1630.2(n) (2)

There can be no question that plaintiff cannot perform the essential function of the job. plaintiff's original job was one which required her to be physically tied to the workstation via the telephone. The job required her to deal with irate customers and to do so in a responsible and reasonable fashion. In sum, the job equals work on the telephone.

The court finds this is a prime example of a job function which is considered essential because the reason the position exist is to perform that particular function. *See* 29 C.F.R. § 1630.2(n)(2). Plaintiff's case is not unlike the plaintiff in the *Larkins* case.

In that case, plaintiff was a Customer Service Representative ("CSR") in defendant's company. Plaintiff was responsible for answering telephone calls from customers who wished to place orders or lodge complaints. *Larkins,* 858 F. Supp. at 1573. CSRs were required to be signed on the telephone system for eight hours and thirty minutes each day. The essential duties of the CSRs was to handle complaints and take orders. The CSR position existed solely to handle customer orders and complaints.

Plaintiff suffered an automobile accident, unrelated to her work and some two years later began experiencing panic attacks and an

anxiety disorder. Plaintiff was prescribed medication, Xanax and Prozac and for a time was on the defendant's short-term disability plan. Defendant accommodated plaintiff's physician's requests for limited work hours with additional breaks. *Id.* at 1274.

Plaintiff's inability to do her job, even with extended breaks, resulted in her leaving work because it was "not sate for Plaintiff to be at work and she was unable to work due to her panic disorder." *Id.* at 1277. plaintiff was declared totally disabled and continues to receive long-term disability benefits from defendant.

In *Larkins,* plaintiff admitted that telephone work was a major essential function of her job, but argued that defendant had violated the ADA by not restructuring the job to eliminate or reduce the telephone time. plaintiff argued that defendant should have accommodated her disability and reduced her telephone time. Because it did not, plaintiff claimed she was entitled to relief under the ADA.

The *Larkins* court, however, found that the ADA "does not require Defendant to eliminate an essential function of the CSR position to accommodate plaintiff. The EEOC's interpretive guidance on the ADA specifically states that 'an employer or other covered entity is not required to reallocate essential functions' of a job.

Interpretive Guidance on Title I o the Americans With Disabilities Act, 29 C.F.R. App. § 1630.2" *Larkins,* 858 F. Supp. at 1583. Other courts have come to the same conclusion. See *Balton v. Scrivner, Inc.,* 836 F. supp. 783, 788-89, n. 4 (W.D. Okl. 1993), *aff'd* 36 F.3d 939 (10th Cir. 1994) (Employer is not required to modify actual duties of a job in order to make an accommodation for individuals who are not capable of performing the essential functions of the job).

In *Johnston v. Morrison, Inc.,* 849 F. supp. 777 (N.D. Ala. 1994), plaintiff was employed as a food server in a restaurant. Plaintiff claimed to suffer from several conditions including panic attack disorder. As a server, she was required to learn, and communicate to customers, information about ingredients, portions and prices. Because the information was constantly changing and had to be relearned, the plaintiff was prone to suffer panic attacks. *Id.* at 778-79. In addition, plaintiff suffered attacks when the restaurant became crowded. *Id.* Defendant assigned the plaintiff to the least busy part of the restaurant but the problem was not alleviated.

The Johnston court granted defendant's motion for summary judgment holding:

Since the plaintiff's disability plainly prevented her from

> **performing the essential functions required of a food server at Morrison's L & N Seafood restaurant, with or without accommodation, the Court finds the plaintiff is not a qualified individual as that term is defined in the ADA and, for that reason, she cannot prevail on her ADA claim.**

Id. at 778.

The court believes plaintiff, like the plaintiffs in *Larkins* and *Johnston*, is simply unable to establish a prima facie case that she is able to perform the essential functions of the job, with or without accommodation. plaintiff is not a qualified individual within the meaning of the ADA because she is not able to perform the essential functions of the job with or without accommodation. Plaintiff was not able to perform the essential function of handling telephone calls from customers.

Having determined that plaintiff could not perform the essential function of the job, the court turns to the second part of the test articulated in *White*. The court mast determine whether any reasonable accommodation by the employer would enable plaintiff to perform those functions.

As it relates to the essential and central telephone function of plaintiff's original job, the court finds no reasonable

accommodation can be found. The sole and essential function of customer telephone inquiry positions, is telephone contact. An accommodation that eliminates an essential function of the job is not reasonable. *Hall v. United States Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988).

Because plaintiff has failed to prove an essential element of her prima facie case no genuine issue of material fact exists and defendant's motion for summary judgment must be granted.

As to plaintiff's contentions that defendant did not reasonably accommodate her, it is necessary that an individual be a qualified individual with a disability before a defendant has a duty to accommodate. *Bolton, supra*, 836 F. Supp. at 789, n. 4. Because the court has found plaintiff was not a qualified individual with a disability, the issue of reasonable accommodation is not relevant.

Plaintiff's other claims are likewise not relevant because of the court's finding that plaintiff was unable to perform the essential function of her job and, therefore, may not invoke the protections of the ADA.

The court notes that plaintiff raised an issue of exacerbation of emotional distress by defendant's action. To the extent that plaintiff

was attempting to raise a claim of personal injury, plaintiff's remedy lies in tort or pursuant to the Worker's Compensation Act. See *Garcia-Paz v. swift Textiles, Inc., 873* F. Supp. 547, 556, n 6 (D. Kan. 1995).

Plaintiff's claim that defendant could not to fill her position at the end of 55 days even though doing so was consistent with defendant's policy is without merit. Likewise, plaintiff's claim that her job with the company should have been held indefinitely raises no issue for determination. By being totally disabled and unable to work, plaintiff cannot now claim to be a qualified individual with a disability because she could not perform the essential functions of her position. *Id.* at 555.

Finally, the court notes that plaintiff concedes that she has been disabled from work since November 17, 1992, and that she does not know if she will ever be able to return to work.[1] It is a reasonable argument that no accommodation can be made for an employee who is entirely unable to work. *Larkins,* 858 F. Supp. at 1581.

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[1] Plaintiff's claim that her expert stated she had the potential possibility in the past and the potential possibility in the future to work, is extremely speculative and does not rise to a level of genuine issue of material fact.

The court finds that plaintiff is not a qualified individual under the ADA because she cannot perform the essential functions of the job with or without accommodation. No genuine issues of material fact exist as to plaintiff's ADA claim, and defendant is entitled to summary judgment as a matter of law.

IT IS THEREFORE BY THE COURT ORDERED that defendant's Motion for summary Judgment (Doc. SC) is granted.

IT IS FURTHER ORDERED that plaintiff's Motion for partial Judgment on the pleadings (Doc. 28) is denied as moot.

IT IS FURTHER ORDERED that plaintiff's Motion in Limine in Reference to Plaintiff's Past Drug Use (Doc. 29) is denied as moot.

IT IS FURTHER ORDERED that plaintiff's Motion in Limine to

Prohibit Reference to plaintiff's Application for and Receipt of Benefits under Social security Disability or Defendant's Long-term Disability policy (Doc. 30) is denied as moot.

IT IS FURTHER ORDERED that defendant's Motion to Amend page 56 of Defendant's Memorandum in Support of Motion for summary judgment (Doc. 54) is granted.

IT IS FURTHER ORDERED that defendant's Motion in

Limine to Exclude Certain Evidence at Trial (Doc. 73) is denied as moot.

Dated this 4th day of July, 1995, at Topeka, Kansas.

DALE E. SAFFELS

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CYNTHIA SMITH,	)	
	)	CIVIL ACTION
Plaintiff,	)	
	)	
v.	)	Case No. 94-4053-DES
	)	
BLUE CROSS BLUE SHIELD OF KANSAS, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the court on plaintiff's motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59 (Doc. 81). Plaintiff also filed a request for oral argument on the motion (Doc. 80). Defendant has filed a response in opposition to the motion (Doc. 85). Having reviewed the motion, the response and the record before it, the court is now prepared to rule.

I. BACKGROUND

On July 6, 1995, this court, by Memorandum and Order, granted defendant's motion for summary judgment. All other motions before the court were denied as moot, except defendant's motion to

amend page 56 of its Memorandum in Support of Summary Judgment which was granted.

This case rose out of plaintiff's claim that she was discriminated against in the terms and conditions of her employment and in the termination of her employment by defendants in violation of the American with Disabilities Act ("ADA"). Specifically, plaintiff claimed she was not reasonably accommodated by defendant, she was wrongfully terminated because of her disability and that defendant's treatment of her exacerbated her condition.

Contrary to these claims, the court found that the plaintiff was not a qualified individual under the ADA because she could not perform the essential function of the job. Further the court found that no reasonable accommodation could be found to allow the plaintiff to perform the essential function of her job.

II. STANDARD OF REVIEW

A motion for reconsideration provides the court with an opportunity to correct "manifest errors of law or fact and to review newly discovered evidence." *Dees v. Wilson*, 796 F. Supp. 474, 475 (D. Kan. 1992), *aff'd* 13 F.3d 405 (1993). A court has discretion whether to grant or deny a motion for reconsideration. *Hancock v. City of*

Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988). There are three circumstances in which a court may appropriately grant a motion for reconsideration: (1) where the court made a manifest error of fact or law; (2) where there is newly discovered evidence; and (3) where there has been a change in the law. *Renfro v. City of Emporia,* Kan. 732 F. Supp. 1116, 1117 (D. Kan.), *aff'd* 948 F.2d 1529 (1991).

A motion for reconsideration is not to be used as a vehicle for the losing party to rehash arguments previously considered and rejected. *National Metal Finishing Co., Inc. v. Barclays American/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990); *In re Oil Spill by "Amoco Cadiz" Off the Coast of France on March 16, 1978*, 794 F. Supp. 261, 267 (N.D. Ill. 1992), *aff'd* 4 F.3d 997 (1993). Indeed, "[a] party's failure to present his strongest case in the first instance does not entitled him to a second chance in the form of a motion to amend." *Paramount Pictures Corp. v. Video Broadcasting Sys., Inc.*, No. 89-1412-C, 1989 WL 159369, at *1 (D. Kan. Dec. 15, 1989) (citing *United States v. Carolina Eastern Chem. Co., Inc.*, 639 F. Supp. 1420, 1423 (D.S.C. 1986)).

III. DISCUSSION

The plaintiff does not argue that there is newly discovered

evidence or a change in the law which would require the court to reconsider its earlier decision. Rather, the plaintiff argues that the court made a manifest error or fact of law.

Specifically, the plaintiff assets that she had established her disability and that her employer was on notice of such disability when she presented medical documentation on November 4, 1992. Plaintiff, there, claims she was a "qualified individual with a disability" under 42 U.S.C. § 12112(a). The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *McDonald v. State of Kan. Dept. of Corrections*, 880 F. Supp. 1416 (D. Kan. 1995). The court found that plaintiff was not a qualified individual because she could not perform the essential functions of her job

The court notes that following her maternity leave in July, 1992, plaintiff was released to return to work with no restrictions. In addition, following her October panic attacks, Dr. Johns faxed a letter to the employer stating that plaintiff was "having a withdrawal reaction as a result of the discontinuation of a prescription medication (Xanax)."

The November 4, 1992, letters indicated plaintiff was depressed and under stress. Both letters contained recommendations that plaintiff be moved into another position. Neither letter stated that plaintiff be moved into another position. Neither letter stated that plaintiff could not work not did they indicate that she was disabled and in need of accommodation. The employer, even though it was not subject to the accommodation provisions of the ADA, transferred plaintiff to another position

On these facts, the plaintiff was unable to state a prima facie case of disability discrimination. Plaintiff could not perform the essential functions of the job and was not "a qualified individual as that term is defined in the ADA." *See Johnson v. Morrision, Inc.*, 849 F. Supp. 777 (N.D. Ala. 1994).

Plaintiff, in her motion, has failed to acknowledge that she has claimed to be totally disabled, unable to work and that she does not know whether she will ever be able to return to work. Even if accommodation were required, none can be made for an employee who is entirely unable to work. *Larkins v. Ciba Vision Corp.*, 858 F. Supp. 1572 (N.D. Ga. 1994).

The granting or denial of a motion for reconsideration lies

within the sound discretion of the court. *Hancock, supra*, 857 F.2d at 1395. The court does not find that plaintiff has met her burden of showing a manifest error of law or fact. Therefore, the court is not inclined to alter or amend its prior judgment.

IT IS THEREFORE BY THE COURT ORDERED that plaintiff's motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59 (Doc. 81) is denied.

IT IS FURTHER ORDERED that plaintiff's request for oral argument (Doc. 80) is denied as moot.

Dated this 29th day of August, 1995, at Topeka, Kansas.

DALE E. SAFFELS
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CYNTHIA SMITH,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 95-3306
	)	
BLUE CROSS BLUE SHIELD OF KANSAS, INC.,	)	
	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 94-4053)

Beth Regier Foerster of McCullough, Wareheim & LaBunker, P.A., Topeka, Kansas, for Plaintiff-Appellant.

Alan L. Rupe of Morrison & Becker, L.L.P., Wichita, Kansas, for Defendant-Appellee.

Before **BALDOCK, McWILLIAMS, AND RONEY***, Circuit Judges.

RONEY, Senior Circuit Judge:

Cynthia Smith sued her former employer, Blue Cross Blue Shield of Kansas, alleging discrimination against her in violation of the Americans with Disabilities Act (ADA). 42 U.S.C. § § 12101-12213. We affirm the summary judgment in favor of Blue Cross, because Smith's evidence does not show discrimination under the ADA.

The ADA prohibits discrimination against disabled persons who are otherwise "qualified individuals" for employment. A qualified individual is one who can perform the essential elements of the job with or without reasonable accommodation. *White, supra*.

Smith alleged her disability was an anxiety disorder that arose from the stress of advising insureds by telephone of the reasons for the denial of their insurance benefits.

Employed in 1989, Smith began working as a correspondent in 1991. Correspondent work involved extensive telephone contact

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*The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by deposition.

with Blue Cross insureds who were inquiring of the status of their

claims for benefits. There is no doubt that the district court correctly concluded from the undisputed evidence that Smith is not qualified to work as a correspondent. The essential function of the correspondent position was to respond to telephone inquiries about the denial of claims. An accommodation that eliminates the essential function of the job is not reasonable. *Hall v. United States Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988); *see also Larkin v. CIBA Vision Corp.*, 858 F. Supp.1572 (N.D. Ga. 1994) (customer service representative unable to perform essential function of handling telephone calls from customers due to panic attacks was not qualified individual under ADA). Assuming the correctness of the district court's decision that Smith was disabled within the meaning of the ADA, there was no accommodation that would permit her to do that job.

In December, 1991, Smith first informed Blue Cross of the problem, made several requests for relief, supported these requests with doctors' written recommendations, and in November, 1992, Blue Cross granted Smith's request for a demotion to an open position, clerk expediter/prescreener. It was undisputed that the duties of the clerk expediter/prescreener position do not include correspondent telephone work. The complaint so alleged, Smith submitted a co-

worker's affidavit so stating, and the district court so found. Thus, the essential elements of the clerk expediter/prescreener job did not implicate Smith's alleged disability, and she was qualified without the need for accommodation.

On November 17, 1992, however, after working a week and a half as a clerk expediter/prescreener, a supervisor brought Smith a stack of papers which Smith claims were described as work from the correspondent's desk to assist with a heavy backlog. Smith did not look at the papers but claims that, fearing this work would inevitably involve stressful telephone contact with insureds regarding denial of their benefits, she suffered an immediate and severe panic reaction and emotional distress.

The following day, Smith was admitted to a hospital and diagnosed with panic disorder. She submitted a request for an open-ended medical leave. Smith's doctor and therapist wrote to Blue Cross confirming the diagnosis and stating that they could not predict a return to work date. On January 11, 1993, after 55 days of leave, Blue Cross informed Smith that her position was being filled with a permanent replacement. That same month, Smith applied for an was granted total disability social security benefits retroactive to November

17, 1992. On May 28, 1993, Blue Cross terminated Smith's employment.

There is no doubt that Smith was not a "qualified individual" at the time she was terminated. By November 18, 1992, Smith was totally disabled. As of the date of her replacement or termination, Smith had presented no evidence of the expected duration of her complete disability. The district court noted that Smith conceded that she did not know if she would ever be able to return to work. An employer is not required to wait indefinitely for her recovery. *See Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996).

The argument that Blue Cross maintained a policy which presents persons with a disability from being able to improve their disabling condition to the point that they would be able to return to the same position is of no avail to return to her clerk expediter/prescreener position.

The argument that Blue Cross violated the Act by maintaining written policies and procedures which were discriminatory against disabled individuals suffering disability, who, because of their medical treatment and injuries, are required to miss 45 days of work is

irrelevant under the facts of this case.

This leaves the argument that Blue Cross violated the Act when her supervisor brought her correspondent work on November 17, 1992, and advised "her that they were going to be bringing her correspondent work due to the backlog on an ongoing basis."

The November 17, 1992, incident is not a failure to accommodate Smith's disability. There was no evidence that Smith would have been required to perform telephone work, only evidence of Smith's fear of this. There is no allegation that Blue Cross was on notice that Smith's workplace panic attacks could be triggered by anything other than actually engaging in correspondent telephone work. Resolving the disputed facts in favor of Smith, there is only evidence that one supervisor in one instance failed to be sufficiently sensitive to Smith's mental condition. This does not evince a failure to accommodate a known disability. *See* 29 C.F.R. § 1630.9; *Stola* v. *Joint Industry Bd.*, 889 F.Supp. 133 (S.D.N.Y. 1995).

The goals of the ADA are to "assure equality of opportunity, frill participation, independent living, and economic self-sufficiency for individuals [with disabilities]." 42 U.S.C. § 12101(a). To achieve these goals, Congress has attempted "to provide clear, strong, consistent,

enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). Nothing in the ADA's express provisions or goals compels liability in this case. While an employer's knowing failure to accommodate special sensitivities of individuals disabled by mental impairment may be actionable under the ADA, the Act is not intended to displace workers' compensation law for disabled persons in all cases or remedy every isolated incident of harm.

The district court correctly held that to the extent Smith was claiming an exacerbation of emotional distress by defendant's action and was attempting to raise a claim of personal injury, her remedy lies in tort or pursuant to the Worker's Compensation Act. *See Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 556 n. 6 (D. Kan. 1995).

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CYNTHIA SMITH, Plaintiff - Appellant, v. BLUE CROSS AND BLUE SHIELD OF KANSAS, INC., Defendant - Appellee.	)	No. 95-3306

JUDGMENT
Entered December 17, 1996

Before BALDOCK, McWILLIAMS, and RONEY*, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas and was argued by counsel.

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*The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by deposition.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

By: L. Balzano
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CYNTHIA SMITH, Plaintiff-Appellant, v. BLUE CROSS AND BLUE SHIELD OF KANSAS, INC., Defendant-Appellee.	)	No. 95-3306

ORDER

Filed February 7, 1997

Before BALDOCK, McWILLIAMS AND RONEY,*, Circuit Judges.

Appellant, Cynthia Smith's petition for rehearing is denied by the panel that rendered the decision.

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*The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: L. Balzano
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 16 1997
CLERK

No. 96-1832

In The

Supreme Court of the United States

October Term, 1996

CYNTHIA SMITH,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF KANSAS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ALAN L. RUPE #08914
MORRISON & HECKER, L.L.P.
150 North Main, Suite 600
Wichita, Kansas 67202-1320
(316) 265-8800

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (602) 342-2831

15 pp

QUESTIONS PRESENTED

Whether this Court should grant a *petition for certiorari* if no conflict exists between the Tenth Circuit Court of Appeals and the Seventh Circuit Court of Appeals regarding reassignment as reasonable accommodation under the Americans with Disabilities Act (ADA)?

Whether this Court should review an issue that was not argued in the Tenth Circuit Court of Appeals?

RULE 29.6 LIST

Respondent, Blue Cross Blue Shield of Kansas, Inc., has no parent companies, subsidiaries or affiliates to list, pursuant to Rule 29.6.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Blue Cross Blue Shield of Kansas, Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 102 F.3d 1075 (1996).

STATEMENT OF THE CASE

Blue Cross Blue Shield of Kansas, Inc. ("Respondent") hired Cynthia Smith ("Petitioner") on June 27, 1988. Petitioner began working as a Level III Informal Review Correspondent in the Medicare division of the Government Programs department. On February 19, 1990, Petitioner transferred to the Medicare Secondary Payor division of the Government Programs department as a Level III Correspondent. On October 1, 1990, Petitioner moved to the Coordination of Benefits (COB) Inquiry unit of Respondent's Subscriber Services department. In this department, Petitioner worked as a Level III COB Inquiry Correspondent ("Inquiry Correspondent").

The primary function of the Inquiry Correspondent position is to respond to telephone calls from Respondent's customers. An Inquiry Correspondent is typically on the telephone for six and one-half hours out of an eight-hour day. Thus, this position exists solely for the purpose of answering telephone queries from customers.

Petitioner alleged that the Inquiry Correspondent position caused her stress. Petitioner attributed her stress to the fact she was required to handle telephone calls

from angry customers who had been or were being denied benefits by Respondent. Petitioner did not like having to inform people their benefits were being denied. Petitioner further alleged that she requested a demotion to a less stressful position in December 1991, which request was denied.

In October 1992, Petitioner requested to be transferred to a vacant Level II COB Clerk Expediter/Prescreener ("Prescreener") position. This position did not involve telephone contact with Respondent's customers. Respondent transferred Petitioner to the Prescreener position, even though Respondent had no duty to do so under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* Petitioner began the Prescreener position on November 7, 1992.

On November 17, 1992, Petitioner claims she was distressed when her supervisor brought her *written* Inquiry Correspondent work to do. She alleges she had an immediate panic attack. That day, Petitioner left work and never returned.

Petitioner *assumed* the Inquiry Correspondent work brought to her would entail contact with customers; she never even looked at the work that was brought to her. In fact, Inquiry Correspondent telephone work was not possible from Petitioner's desk, because her telephone was not programmed to receive incoming customer calls.

On January 11, 1993, Petitioner had been off work for fifty-five days. At that time, there was no indication she would be able to return to work. All during the time relevant to this case, Respondent maintained a leave policy. According to this policy, if an employee's leave

extended beyond forty-five days, Respondent was not obligated to return the employee to the same position. Due to Petitioner's prolonged absence, Respondent's policy, and the COB Inquiry unit staffing requirements, Respondent informed Petitioner that her position was being filled by a permanent replacement.

During Petitioner's absence from work, she received psychiatric treatment. On January 18, 1993, her doctor indicated that she would never release Petitioner to return to work for Respondent. To this date, Petitioner has never been released to return to work for Respondent.

REASONS WHY THE PETITION SHOULD BE DENIED

1. No conflict exists between the Tenth Circuit Court of Appeals and the Seventh Circuit Court of Appeals regarding reassignment as a reasonable accommodation under the ADA.

Petitioner claims the Tenth Circuit's decision in this case is in conflict with the Seventh Circuit's decision in *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996). The two decisions are not in conflict. In *Gile*, the Seventh Circuit addressed *what* constitutes a reasonable accommodation under the Americans with Disabilities Act (ADA). *Gile*, 95 F.3d at 496-99. The issue in the Tenth Circuit's decision in this case was *whether* Respondent had a duty to reasonably accommodate Petitioner under the ADA.

In order to be protected by the ADA, an employee must be a "qualified individual with a disability." 42 U.S.C. § 12112(a). In this case, Petitioner was not a "qualified individual," as defined by the ADA, because she could not perform the essential function of her job as an Inquiry Correspondent, with or without reasonable accommodation. 42 U.S.C. § 12111(8).

The essential function of the Inquiry Correspondent position was to respond to Respondent's customers' inquiries by telephone. Petitioner alleges that speaking with customers distressed her. Therefore, Petitioner was not qualified to be an Inquiry Correspondent. Since Petitioner was not qualified, there was no reasonable accommodation that would enable her to do the work of an Inquiry Correspondent. Respondent had no duty to accommodate her. In spite of this, Respondent did reassign Petitioner to a Prescreener position. The Prescreener position did not require Petitioner to answer telephone calls from customers. As previously stated, the telephone at Petitioner's desk was not even programmed to receive incoming customer calls.

When Petitioner suffered a panic attack on November 17, 1992, while working as a Prescreener, it was not the result of anything the Respondent did. Respondent did not breach an accommodation provided to Petitioner. First, for reasons already stated, Respondent had no duty to accommodate Petitioner under the ADA. Therefore, it could not breach a duty not owed to her. Second, Respondent did not give Petitioner Inquiry Correspondent work that required telephone contact. The work given to Petitioner was *written* Inquiry Correspondent work.

Petitioner's termination on May 28, 1993, was also not a failure to reasonably accommodate. Petitioner had not worked since November 17, 1992, and she had been unable to perform her job with or without accommodation. Furthermore, Petitioner was not able to return to work for Respondent in *any* position. Respondent followed its normal policy regarding employees who remain unable to return to work after fifty-five consecutive days absent. As discussed above, Petitioner's doctor never has released her to return to work. Petitioner was not a qualified individual, and there was no reasonable accommodation that could have been provided for her.

The Tenth Circuit's decision in this case is not inconsistent with the Seventh Circuit's decision in *Gile*. In *Gile*, the plaintiff was a data-entry operator for United Airlines, Inc. 95 F.3d at 493. Gile worked the night shift. *Id.* at 493-94. While assigned to the night shift, Gile experienced many problems, including: daytime insomnia, fatigue, and falling asleep while driving to and from work. *Id.* at 494. Gile's problems eventually escalated into depression. *Id.* She was diagnosed as suffering from a "depressive reaction in anxiety state exacerbated with sleep disorder." *Id.* A social worker told Gile that working the night shift aggravated her symptoms. *Id.*

Gile filed a complaint against United Airlines, Inc., for failing to reasonably accommodate her by reassigning her to a different position during the day shift. *Id.* United Airlines, Inc., considered reassigning her to a day shift data-entry position, but no positions were available. *Id.* Gile was willing to be transferred to *any* position, not just a data-entry position. *Id.*

The issue decided by the Seventh Circuit was what constitutes a reasonable accommodation. (e.g., reassignment to the same position or reassignment to *any* position) The Seventh Circuit held that the ADA "may require an employer to reassign a disabled employee to a different position as reasonable accommodation where the employee can no longer perform the essential functions of their current position." *Id.* at 498. The court further recognized that there are "significant limitations on an employer's potential obligation to reassign a disabled employee." *Id.* at 499. To illustrate the limitations on an employer's obligation to reassign a disabled employee, the Seventh Circuit cited the Tenth Circuit's decision in *White v. York Int'l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995). *White* held that the ADA does not require employers to do any of the following to reasonably accommodate disabled employees: promote them; reassign them to positions already occupied; or create new positions for them. 45 F.3d at 362.

In *White*, the Tenth Circuit did not conclude that the ADA does not require employers to reassign disabled employees. The court merely specified limitations on employers' obligations to reassign. *Id.* In *Gile*, the Seventh Circuit recognized further limitations on the obligation to reassign – limitations that were not addressed in *White*. 95 F.3d at 499.

Gile held that employers do not have to accommodate disabled employees by reassigning them to positions they request or prefer. *Id.* (citing *Schmidt v. Methodist Hosp., Inc.*, 89 F.3d 342, 344-45 (7th Cir. 1996)). In the current case, Respondent did in fact reassign Petitioner to a position *she requested*. According to *Gile*, this was not

required. *Id.* The Seventh Circuit further held that if an employer is obligated to reassign an employee, the reassignment should not cause an undue hardship on the employer. *Id.* (citing 42 U.S.C. § 12112(b)(5)(A)).

Regardless of whether, and to what extent, the ADA requires reassignment as reasonable accommodation, Petitioner in the current case *was* reasonably accommodated by reassignment to a less stressful position. The Seventh Circuit's decision in *Gile* supports what Respondent did in the current case.

Gile determined that in accommodating a disabled employee, employers should not only look to reassignment within the same position, but also reassignment to another position within the company. This is exactly what the Respondent did by transferring Petitioner to the Prescreener position. Once Petitioner became totally disabled, there was nothing more the Respondent could do to accommodate her.

The difference between the Seventh Circuit's decision in *Gile* and the Tenth Circuit's decision in the current case is that the Seventh Circuit addressed *what* constitutes a reasonable accommodation, while the Tenth Circuit addressed *whether* Respondent had a duty to accommodate Petitioner. In *Gile*, the plaintiff was able to perform the essential function of her job. Gile experienced adverse effects resulting from the shift she worked, not the job itself. Petitioner in this case could not perform the essential function of the Inquiry Correspondent job. Furthermore, after November 17, 1992, Petitioner was completely disabled and could not perform the essential function of *any* job offered by Respondent.

The Tenth Circuit and the Seventh Circuit are not in conflict regarding an employer's duty to reassign disabled employees as reasonable accommodation. The two cases Petitioner cites to support this claim did not address the same issue. In *Gile*, the Seventh Circuit cited the Tenth Circuit's decision in *White*. This same *White* opinion was relied upon by the federal district court and the Tenth Circuit panel in the case at bar. If the two circuits were in conflict, one would not be citing the other to support its position. Therefore, this Court should not grant certiorari based on a conflict between the Tenth and Seventh Circuits. No conflict exists.

2. Even if Respondent had a duty to reasonably accommodate Petitioner, it did so.

Since Petitioner was unable to perform the essential functions of the Inquiry Correspondent job, she was not a "qualified individual with a disability." Therefore, Respondent had no duty to reasonably accommodate Petitioner under the ADA.

In spite of this, Respondent did accommodate Petitioner by reassigning her to a job that did not require telephone contact with Respondent's customers. Once Petitioner was reassigned to the Prescreener position, she never handled incoming customer calls. Handling incoming calls was physically impossible because Petitioner's telephone was not equipped to receive incoming calls from customers.

Petitioner suffered a panic attack when she *assumed* written Inquiry Correspondent work that was assigned to her would involve customer contact. The *written* Inquiry

Correspondent work involved no telephone contact with customers, and, therefore, Respondent did not breach Petitioner's accommodation.

3. Petitioner cannot bring an issue before this Court that was not raised before the Tenth Circuit Court of Appeals.

In the Tenth Circuit Court of Appeals, Petitioner argued that Respondent failed to reasonably accommodate her. In her petition for writ of certiorari, Petitioner now argues Respondent did not provide a reasonable accommodation, because it offered her a job in which she was unable to perform an essential function.

When issues are neither raised nor considered in the circuit courts, this Court ordinarily does not consider them. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (holding that a question presented in the petition for certiorari but not raised in the court of appeals is not properly before the Court).

The Court will consider questions raised for the first time only in exceptional circumstances. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976). The case currently before the Supreme Court does not involve exceptional circumstances. Instead, Petitioner is restructuring her argument in a last-ditch effort to save her case.

Since Petitioner failed to raise this issue in the courts below, the record is inadequate to permit the Court to consider this argument. The district court's decision

granting summary judgment and the Tenth Circuit's decision affirming the district court were proper, because no genuine issue of material fact exists. Fed. R. Civ. P. 56(c).

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that Petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

ALAN L. RUPE #08914
MORRISON & HECKER L.L.P.
150 North Main, Suite 600
Wichita, Kansas 67202-1320
(316) 265-8800
Counsel for Respondent